In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 607

ISIDORE PRESS, alias JOHN GRADY; BUY RITE BUYERS CLUB, INC.; FACTORY SUPPLY CO., INC.; STANDARD DISTRIBUTORS, INC.; AND AMERICAN WHOLESALERS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B, pp. 9-41; III. 49-80)[1] is not yet reported.

---

[1] The certified record is in three volumes. "I" refers to petitioners' appendix filed in the court of appeals. Vol. II is defendant Fry's appendix filed below. "III" refers to the government's appendix filed in the court below, supplemented by the proceedings in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1964 (III. 81). A petition for rehearing was denied on October 8, 1964 (III. 99-101). The petition for a writ of certiorari was filed on October 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the testimony that numerous complaints were received from victims was properly admissible as background evidence and to show petitioners' knowledge and intent.

2. Whether petitioner Press was properly cross-examined as to his motives for conducting the activities in question from an office in Vermont, rather than from New Jersey where the business had its headquarters and where its warehouse was located.

STATEMENT

Petitioner Press and others were convicted by a jury in the United States District Court for the District of Vermont for mail fraud and conspiracy. He was sentenced to concurrent terms of three years' imprisonment. The four corporate petitioners were convicted of conspiracy and each fined $10,000.[2] The court of appeals affirmed, one judge dissenting.

---

[2] Petitioner Press was found guilty of 24 counts under the mail fraud statute, 18 U.S.C. 1341, and one count of conspiracy. Defendant Fry, Jr., was also convicted on 24 counts of mail fraud and of conspiracy and sentenced to five years'

The evidence, the sufficiency of which is not challenged, is set forth in detail in the opinion below (III. 49-80). In brief, it shows that numerous persons were solicited to join the "Buy-Rite Buyers Club" for $7.00 per year. Among other "advantages," the club offered merchandise at factory or importers' prices and an "introduction to a unique Factory Buying Plan * * * to buy 20,000 items" at these prices. Actually subscribers could only buy about 2,000 items. After they joined, they were "introduced" to the opportunity to join another club run by petitioner Factory Supply Co. for a further $13.75 and to obtain the right to purchase from "Master Factory Price Index." After initial mailings, but before a large number of additional advertisements were sent, the promoters printed some 50,000 copies of a "disclaimer" letter sent to those who complained, explaining that members must have understood that $7.00 could not possibly cover an offering of 20,000 items and setting forth the advantages of the second club. All of the corporations and various clubs were controlled by petitioner Press and defendant Fry (who used the name Grady). Headquarters was in New Jersey and all mailings were made from New York. Buy Rite was incorporated in Vermont, and was limited to a small office, post office box, and three or four employees for clerical help.

---

imprisonment. Defendant Lawrence Press was acquitted of conspiracy, but convicted of the mail fraud counts and received a suspended sentence. Selmajane and William Stuchel, who were office employees in Vermont, were acquitted on all counts.

Some thirty members testified to their persistent efforts to obtain refunds for merchandise or membership fees after waiting months for merchandise that was not delivered.

ARGUMENT

Petitioners have raised no question as to the sufficiency of the evidence. Indeed, the court below characterized this scheme as "not even one of the 'close' cases arising under the Mail Fraud Statute" (III. 57-58). It is in this context that petitioners' questions relating to the admission of evidence are to be viewed.

1. The court properly admitted evidence of numerous complaints for the limited purpose of proving intent—that is, to show that petitioners knew that numercus persons had in fact been misled. Two witnesses, representing the Greater Bennington Association (similar to a Chamber of Commerce or Better Business Bureau), testified to the receipt of complaints and their procedure in notifying Buy Rite (III. 1-14). This testimony was clearly admissible to show that petitioners had knowledge of the fact that people were misled and to dispel any notion that this was merely a poorly conducted business venture. *United States* v. *Kyle*, 257 F. 2d 559, 564 (C.A. 2), certiorari denied, 358 U.S. 937. A third witness, a postal inspector, testified that he had received approximately sixteen hundred letters regarding Buy Rite Buyers Club, Inc., and a similar number relative to Factory Supply Company (III 14-16). While it

was not shown that all of these had been brought to the attention of petitioners, it did appear that the company itself received a number of complaints[3] and that the attorney for Buy-Rite wrote the postal inspector suggesting that the inspector adopt certain procedures for forwarding complaints (III.64-65). In view of the evidence that Buy-Rite found it necessary to prepare some 50,000 disclaimer letters (III.58-59) for distribution to those who "misunderstood" their advertisement, the testimony of the inspector as to the number of complaints was hardly significant. In any event, the evidence was properly limited when the trial court charged the jury that only those complaints brought to their attention "are relevant and may be used by you in determining the knowledge and intent of the purpose of the defendants * * *" (III.46).[4]

---

[3] The inspector testified to his observance of the method of handling complaints in the office in Vermont and in New Jersey.

[4] Contrary to petitioners' claim, there is no conflict among the circuits. *United States* v. *Levy*, 138 F. 2d 429, 433 (C.A. 7), merely held that numerous letters expressing satisfaction never shown to a defendant were inadmissible as bearing on a defendant's good faith. Similarly in *Goldstein* v. *United States*, 63 F. 2d 609, 615-616 (C.A. 8), letters from satisfied customers were held inadmissible as hearsay and irrelevant on the issue of "intent" since there was no evidence that defendant relied upon them. *Harrison* v. *United States*, 200 Fed. 662, 673-674 (C.A. 6), involved one letter, which although not wholly immaterial on the question of intent, was of remote and uncertain bearing as compared to its prejudicial effect. The court said (p. 675) that if the respondent had been shown other similar letters they would be admissible as

2. It was also proper to probe petitioners' motives in opening a small office in Vermont as a "front" for the New Jersey operations. Whether the purpose was to give an aura of "rural honesty" to the operation was a question for the jury. In addition, this brief exchange (III. 16-17) was properly characterized by the court below as "innocuous" (III. 71-72).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

NOVEMBER 1964

---

to his intent. To like effect are *Hair* v. *United States*, 240 Fed. 333, 336 (C.A. 7), and *Dr. J. H. M'Lean Medicine Co.* v. *United States*, 255 Fed. 694, 697 (C.A. 8). Contrary to the assertion by the dissent below (III. 80), neither the government, the trial court nor the majority below held that this evidence was admissible to prove the fraud.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 784980 394